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No. 87-2062

In the Supreme Court of the United States

OCTOBER TERM, 1988

MILTON E. HARGROVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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26

QUESTIONS PRESENTED

1. Whether Articles 16(1)(A) and 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. (& Supp. IV) 816(1)(A) and 852(a)(2), violate the Constitution by permitting a defendant to be convicted by the two-thirds vote of a court-martial panel containing as few as five members.

2. Whether the evidence was sufficient to prove that petitioner was sane at the time of the crimes for which he was convicted.

3. Whether the court-martial panel was correctly instructed on the elements of murder and insanity.

4. Whether improper conduct by one of the members of the court-martial panel constituted reversible error.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution and statutes:

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-14a) is reported at 25 M.J. 68. The opinion of the Army Court of Military Review (Pet. App. 15a-29a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 25, 1987. A petition for reconsideration was denied on April 1, 1988. The petition for a writ of certiorari was filed on May 31, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Frankfurt, West Germany, between September 5 and November 21, 1981. He was convicted of murder and aggravated assault, in violation of Articles 118 and 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918 and 928. He was sentenced to confinement for 20 years, a dishonorable discharge, and reduction to the lowest enlisted grade. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 15a-29a). The Court of Military Appeals affirmed (*id.* at 1a-10a).

1. a. On November 4, 1980, at a railhead in Parsberg, West Germany, two American soldiers were killed when the tank in which they were sleeping, designated as Alpha-33, was struck by an armor-piercing shell. Two other soldiers sleeping in the same tank were seriously injured. Petitioner's tank, designated as Alpha-35, was parked directly ahead of Alpha-33 (Tr. 1175). The main gun of petitioner's tank was pointed directly at Alpha-33 and was approximately five feet from it (Tr. 1083, 1089, 1162). The barrel of Alpha-35's main gun had been locked in that position (Tr. 1079; see GX 26-27). The evidence at trial established that the armor-piercing shell that killed and wounded the soldiers in Alpha-33 was fired from petitioner's tank. Strong circumstantial evidence indicated that petitioner fired the round that killed and wounded his fellow soldiers. Pet. App. 2a-3a, 16a-17a.

b. Following his arrest on November 6, 1980, petitioner was placed in pretrial confinement. There, his condition deteriorated rapidly. He was variously

described as "incoherent," "generally uncooperative," "uncommunicative," and "unshaven and dirty" (Tr. 1759, 1839, 1847).[1]

A board of medical officers was convened on January 6 and 28, 1981, to evaluate petitioner's sanity.[2] On February 4, the board concluded that petitioner suffered from a schizophrenic disorder of the paranoid type, and that, as a result, petitioner lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law (AX 47, at 6). The board also concluded, however, that petitioner "did not lack substantial capacity to form the intent necessary to commit premeditated murder, to form the degree of willfulness necessary to commit premeditated murder, or to premeditate a design to kill" (*ibid.*). On February 11, Major General Ulmer, petitioner's commanding officer, asked the board to clarify its conclusions (AX 49). The board responded that petitioner had sufficient cognitive organization to plan and complete the crimes, but that his motives were based upon a psychotic delusional system (AX 50). On March 17, Major General Ulmer ordered a second sanity board examination of petitioner (AX 51). The two members of that sanity board who reached

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[1] One of the mental health professionals at the confinement facility testified that petitioner was "covertly belligerent" on November 12, 1980 (Tr. 1848), although petitioner's cognitive function was deemed to be within normal limits (AX 28). On December 10, 1980, in his formal assessment, the professional found that petitioner was aware of reality, but had "an explosive personality" (Tr. 1848; AX 29).

[2] The sanity board was appointed by the Commander of the 3d Armored Division pursuant to Paragraph 121 of the *Manual for Courts-Martial, United States, 1969* (rev. ed).

conclusions both found that petitioner was able to appreciate the criminality of his acts and did not lack capacity to conform his conduct to the requirements of the law (Tr. 2386, 2449).

2. Petitioner's sole defense was insanity. He presented numerous witnesses, including lay witnesses and psychiatric experts, in support of his claim that he lacked mental responsibility for his crimes. Petitioner did not testify.

Petitioner's lay witnesses from his previous duty assignment at Fort Riley, Kansas, testified that petitioner had performed well as a tank commander and in a position of greater authority (Tr. 1458-1491; DXs E, F).[3] Other lay witnesses also said that petitioner behaved in an unusual manner on a number of occasions after arriving in Germany in July 1980 (Pet. 4-6).[4] On August 8, 1980, petitioner was referred by his company commander to the mental

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[3] In 1978, however, petitioner had received a nonjudicial punishment when he was in training at Fort Knox in Kentucky (Tr. 1778; DX X). One of petitioner's experts testified that petitioner assaulted a fellow soldier who "rudely" bumped him with a garbage can (Tr. 2005). Another of petitioner's experts stated that the incident occurred without provocation (Tr. 2210).

[4] In August 1980, petitioner struck Helmut Bolus, a German national, without apparent provocation (Tr. 1903-1907). He also struck his roommate, Sergeant Stoy Ferry, after an argument about how loudly Ferry was playing his music (Tr. 2371-2376). Other members of petitioner's unit testified that petitioner behaved as if he heard voices, and that he was rude and inconsiderate (Tr. 1572-1574, 2376). When petitioner was screened for the first time at the mental health clinic, he told his interviewers that he did not hear voices inside his head or have hallucinations (Tr. 1778).

health clinic in Freiburg (Tr. 1767; DX X).[5] Petitioner's platoon leader testified that after the referral, petitioner "straightened up his act quite a bit" (Tr. 1607). There were no other violent incidents before the soldiers were killed on November 4 (Pet. 6). Petitioner was also interviewed on October 7 as part of a general mental health screening of his unit (Tr. 1781). At that time petitioner was "very coherent" (*ibid.*).[6]

In addition to his lay witnesses, petitioner presented the testimony of seven psychiatrists in support of his insanity defense. They concluded that petitioner suffered from schizophrenia or paranoid schizophrenia at the time of the crimes and that petitioner's condition substantially impaired his ability to conform his conduct to the requirements of the law.[7] Petitioner's experts were less categorical concerning

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[5] Petitioner was seen by Dr. Robert Pather. Dr. Pather noted that petitioner has a "[p]ossible borderline syndrome" (Tr. 1609; DX KK, at 5). Dr. Pather also noted there was no observable evidence of cognitive disturbance and that petitioner indicated that he realized he had gotten off to a bad start with his unit and that he would have to "straighten out" or risk being discharged (DX KK, at 4).

[6] Petitioner was seen by Sergeant Robert Hastings, one of the same individuals who had screened him on August 8. Hastings described petitioner as "a different person" in the second interview (Tr. 1781). At that time, petitioner was optimistic and responsive, whereas the first time petitioner was seen, his posture was rigid and his motions were mechanical (Tr. 1766-1780).

[7] Tr. 1985-1989 (Dr. Rollins), 2056-2058 (Dr. Rohlfs), 2122-2124 (Dr. Hunter), 2189-2190 (Dr. Howard), 2220-2221 (Dr. Leppla), 2253-2254 (Dr. Hubbard), 2304-2306 (Dr. Corcoran).

whether he had the capacity to appreciate that his actions were criminal.[8]

The government presented two psychiatric experts in rebuttal, Lieutenant Colonel Joe Fagan and Dr. Frank Geiser. Colonel Fagan concluded that petitioner had a mental illness that he described as a "borderline condition" (Tr. 2389). Colonel Fagan testified that petitioner was able to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law (Tr. 2386).[9] Dr.

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[8] Dr. Rollins was "less certain" about petitioner's lack of capacity to appreciate the criminality of his conduct than about his capacity to conform his conduct to the requirements of the law (Tr. 1990). Dr. Rohlfs considered the question whether petitioner could appreciate the criminality of his actions to be "academic" (Tr. 2058), but admitted that it posed a "more difficult question" (*ibid.*). Dr. Hunter did not know whether petitioner was able to appreciate the criminality of his actions (Tr. 2123-2124). Dr. Leppla believed that petitioner could appreciate the criminality of his actions (Tr. 2221). And Doctors Howard, Hubbard, and Corcoran believed that petitioner could not appreciate the criminality of his actions (Tr. 2189-2190, 2254, 2305).

[9] Colonel Fagan had preliminarily come to the opinion that petitioner suffered from paranoid schizophrenia and that he was unable to conform his conduct to the requirements of the law, although he could appreciate the criminality of his conduct (Tr. 2385; DX RR). His preliminary conclusions were premised upon a misconception that petitioner's condition immediately following the explosion was the same as his condition at the time of the first sanity board, when he was disheveled, severely regressed, and psychotic (Tr. 2406). When Colonel Fagan discovered that petitioner was not in that state at the time he fired the main gun of Alpha-35, the colonel changed his mind (Tr. 2412). Colonel Fagan recognized the presence of paranoid ideation in petitioner, but he did not see a connection between the paranoid ideas and the act of firing at the tank (Tr. 2424).

Geiser, a civilian, had observed petitioner for 10 to 15 hours in January 1981 (Tr. 2443) and had participated in the second sanity board investigation (Tr. 2444). He agreed that petitioner suffered from paranoid schizophrenia (Tr. 2449), but he also concluded that having a mental illness does not necessarily deprive a person of a sense of right or wrong or the ability to guide his conduct (Tr. 2452).[10] Dr. Geiser concluded that petitioner did not lack the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law (Tr. 2449).

Petitioner was found guilty of two specifications of murder by firing the main gun of his tank, an act inherently dangerous to others and evincing a wanton disregard for human life (Tr. 2845). Petitioner was also found guilty of two specifications of aggravated assault (Tr. 2845-2847).

3. The Army Court of Military Review affirmed (Pet. App. 15a-29a). It found the evidence was sufficient to prove that petitioner was sane at the time of the crimes (*id.* at 18a). After independently examining the record, the court concluded that, although petitioner may have suffered from a mental disease or defect on the night of the crime, he was capable of appreciating the criminality of his actions and of conforming his conduct to the requirements of the law (*ibid.*).

4. The Court of Military Appeals affirmed on the two issues on which it granted review. Pet. App.

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[10] During the trial judge's instructions, one of the court members asked the judge whether an individual could be found mentally responsible even though he was suffering from a mental illness. The trial judge responded affirmatively; the defense did not object to that response (Tr. 2797-2798).

1a-10a. First, it rejected petitioner's challenge to the trial court's instructions. The court held that the instruction on murder was correct (*id.* at 3a) and that in any event petitioner's failure to object to the alleged error constituted a waiver (*id.* at 4a). The court also rejected petitioner's claim that the panel was misinstructed concerning his defense of insanity (*id.* at 4a-6a). Second, the court found beyond a reasonable doubt that petitioner was not prejudiced as a result of any misconduct by a member of the court-martial panel (*id.* at 9a).[11] Chief Judge Everett dissented only with respect to the issue of the court's instructions. He disagreed with the court's approval of the instruction on murder by means of an inherently dangerous weapon, although he concluded that that error did not require reversal. He also concluded that the trial judge had incorrectly charged the panel with respect to the definition of the term "substantial capacity." *Id.* at 11a-13a.[12]

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[11] During a recess in the trial, one of the panel members positioned two tanks in his unit to simulate the positions of the vehicles on the night of the crimes. The affidavit in which that panel member described the incident is reproduced in the opinion of the Court of Military Appeals, Pet. App. 8a-9a.

[12] On March 5 and 13, 1987, a hearing was held at Fort Leavenworth, Kansas, to determine whether petitioner should be transferred to the custody of the Attorney General for care or treatment in a suitable federal medical facility. On March 30, 1987, a military judge submitted written findings and recommendations (Pet. App. 32a-35a), which were approved by the commanding general at Fort Leavenworth on April 9, 1987. The procedures used and the findings made were comparable to those found to be constitutionally required in *Vitek* v. *Jones*, 445 U.S. 480 (1980). On May 1, 1987, petitioner was accepted by the Bureau of Prisons for confinement

ARGUMENT

1. Petitioner contends (Pet. 8-15) that his Fifth and Sixth Amendment rights were violated when he was convicted by a possibly nonunanimous five-member court-marial panel. Petitioner did not raise that claim at trial, however. Petitioner raised no objection to the number of panel members when the panel was formally constituted following voir dire (Tr. 746-747), and petitioner also acknowledged, without objection, that he could be convicted by a nonunanimous vote of the panel (Tr. 2536). In any event, petitioner's claim is the same as the one presented in the petition in *Johnson* v. *United States*, No. 87-1983. For the reasons given in our brief in opposition in that case, further review of petitioner's claim is not warranted.[13]

2. Petitioner claims (Pet. 15-19) that the evidence was insufficient to prove that he was sane at the time of the crimes. He argues (Pet. 15, 19, 25) that the evidence was "overwhelming" that he was unable to conform his conduct to the requirements of the law as a result of a schizophrenic disorder; petitioner does not claim that he was unable to appreciate that his actions were criminal. That fact-bound claim was independently considered and rejected both at trial

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and treatment pursuant to 18 U.S.C. (& Supp. IV) 4244. He was transferred from the United States Disciplinary Barracks to the medical center for federal prisoners in Springfield, Missouri, on May 27, 1987. That facility is able to provide petitioner with the attention and inpatient psychiatric care that the military judge found he needed (Pet. App. 35a).

[13] We have provided petitioner's counsel with a copy of our brief in *Johnson*.

and on appeal,[14] and it does not warrant review by this Court.

This Court has explained that "[w]hen the basic issue before the appellate court concerns the sufficiency of the Government's proof of a defendant's sanity * * *, a reviewing court should be most wary of disturbing the jury verdict." *Burks* v. *United States*, 437 U.S. 1, 17 n.11 (1978). "'[I]n view of the complicated nature of the decision to be made—intertwining moral, legal, and medical judgments—it will require an unusually strong showing to induce us to reverse a conviction because the judge left the critical issue of criminal responsibility with the

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[14] In addition to the panel that convicted him, the Army Court of Military Review independently reviewed the sufficiency of the evidence on the issue of petitioner's mental responsibility, pursuant to Article 66(c), UCMJ, 10 U.S.C. 866(c). That statute authorizes the courts of review to "weigh the evidence, judge the credibility of witnesses and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses." After careful consideration, the Army Court of Military Review concluded that the government had proved beyond a reasonable doubt that petitioner was sane at the time of the murders. Pet. App. 16a-20a. The Court of Military Appeals did not grant review on that question.

There is, accordingly, a question whether that issue is even subject to review by certiorari in this Court. 28 U.S.C. (Supp. IV) 1259(3) and 10 U.S.C. (Supp. IV) 867(h)(1) restrict this Court's certiorari jurisdiction to the review of "[d]ecisions" of the Court of Military Appeals. That court has the statutory right, which it exercised in this case, to limit its decisions in any case to less than all the issues urged by the accused. See 10 U.S.C. 867(d). Because the Court of Military Appeals declined to accept this question for review, there is a question whether that court rendered a "decision" on this issue.

jury.'" *Ibid.* (citation omitted). Petitioner has not made that showing.

First, there was considerable evidence that petitioner was capable of understanding and directing his actions at the time of the crimes. For example, after petitioner visited the Mental Hygiene clinic on August 8, 1980, he engaged in no further violent outbursts until November 4, the day of the murders. During that period, it appears that petitioner was able to control his conduct. The court-martial panel heard testimony indicating that petitioner was angry at the time of the murders (Tr. 1662-1663, 1678, 1679). The members also heard testimony that petitioner drove his tank "very well" from Hohenfels to Parsberg on the evening of the crime (Tr. 1077). Petitioner was also able to drive his tank away from the burning wreckage of Alpha-33 after the explosion (Tr. 896-897). Moreover, petitioner performed a complicated series of actions in order to fire his tank's main gun (Tr. 1231-1232), and he appropriately selected an armor-piercing shell to carry out his intent, rather than use some other type of available ordnance (Tr. 1094; GX 25). After he fired his main gun, petitioner sought to conceal his involvement in the murders. He replaced the spent shell in the storage rack, turned off the power, and opened the loader's hatch (Tr. 1089). When petitioner's sergeant responded to the explosion by climbing onto petitioner's tank and calling inside for a fire extinguisher, petitioner quickly located one and handed it to the sergeant without identifying himself (Tr. 1090). Finally, after the murders and before his arrest, petitioner displayed a consciousness of guilt. On both the night of and the morning after the crimes, petitioner indicated a desire to get out of the

Army (Tr. 1042). For example, he told two of his associates that he wanted to take leave immediately (Tr. 1098, 1215). Petitioner even withdrew $500 from the company safe that day and asked the first sergeant if he could take leave "starting right then" (Tr. 1595).

Second, there was considerable psychiatric evidence that petitioner was sane. Two government psychiatrists testified that petitioner did not lack substantial capacity to conform his conduct to the requirements of the law or to appreciate the criminality of his acts (Tr. 2386, 2449). Both experts agreed that petitioner suffered from a mental illness, but Colonel Fagan saw no connection between petitioner's paranoid thinking and his decision to fire the gun (Tr. 2424-2425). Dr. Geiser believed that petitioner had a delusional thought process, but he found that petitioner was capable of "clear, good thinking" (Tr. 2453), and he did not believe that petitioner's illness deprived him of the ability to guide his conduct or to distinguish right from wrong (Tr. 2452).

Petitioner's experts disagreed with the government's psychiatrists, but that disagreement, as the Army Court of Military Review explained, "can be traced to the time period in which they observed and examined [petitioner] and the facts and documents used in their evaluation" (Pet. App. 18a). Several defense experts examined petitioner as much as a year after the murders, at a time when petitioner's mental condition had deteriorated. That lapse of time, the court of military review found, was highly significant. *Ibid.* Moreover, none of the defense experts had considered all of the evidence that was before the second sanity board. *Id.* at 20a.

By contrast, the government's psychiatrists examined petitioner at a point closer in time to the date of the crimes, both experts were members of the second sanity board that examined petitioner, and Dr. Geiser was petitioner's attending physician when petitioner was first hospitalized. *Id.* at 19a. Under those circumstances, the court-martial panel had a substantial basis for crediting the opinions of the government's psychiatrists, rather than the defense experts.

Petitioner seeks to discredit the opinons of the government's psychiatrists, but his efforts on that score are unpersuasive. Petitioner dismisses Dr. Geiser's testimony (Pet. 16-17), but he does not offer any reason why the panel could not credit that testimony. Petitioner attacks Colonel Fagan's testimony by implying (*id.* at 18) that Colonel Fagan changed his mind after speaking with the commanding general at a social gathering, thereby suggesting that Colonel Fagan was subjected to improper command influence. That claim was rejected by the trial judge, however, and it is not supported by the record.[15] As

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[15] At a hearing on petitioner's motion to dismiss for lack of speedy trial, Colonel Fagan testified that he spoke with General Ulmer at a change-of-command ceremony after he had been assigned to petitioner's sanity board (Tr. 84). In response to General Ulmer's questions, Colonel Fagan indicated that his conclusions might very well agree with those of the first sanity board, although for different reasons (Tr. 85). General Ulmer indicated he found it difficult to understand "how someone could cognitively go through the tasks and yet not know what they were doing" (*ibid.*). The conversation was then interrupted and was never resumed (*ibid.*). Colonel Fagan did not feel threatened by General Ulmer's attitude (Tr. 91), and the general's questions had nothing to do with Colonel Fagan's subsequent change of opinion (Tr. 92). General Ulmer never suggested that Colonel Fagan rethink his

the Army Court of Military Review explained, Colonel Fagan "changed his opinion because he failed to appreciate in his first evaluation the significant time lapse between the firing of the tank and the time [petitioner] was seen in pretrial confinement." Pet. App. 19a; *ibid.* ("[Colonel Fagan] explained that his earlier evaluation 'was premised on a misconception . . . that [petitioner's] condition immediately following the firing of the tank was essentially the same as the condition described in the first sanity board.' "). The testimony of the government's experts therefore provided sufficient evidence to support the court-martial panel's findings, particularly when that testimony is considered in light of petitioner's actions on the night of and the day following the crimes.

Besides raising a purely factual issue, petitioner's claim arises under a legal standard that is no longer applicable in military or other federal cases. At the time petitioner was tried and convicted, the military used the test for insanity recommended by the American Law Institute. Under that test, a person was not responsible for criminal conduct if, as the result of a mental disease or defect, he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The government bore the burden of proving that the defendant was sane. Pet. App. 5a; *United States* v. *Frederick*, 3 M.J. 230, 234

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position (Tr. 94). Petitioner stipulated that General Ulmer would testify that his brief conversation with Colonel Fagan addressed only Colonel Fagan's reasoning, not his conclusions (Tr. 401). Petitioner moved to strike Colonel Fagan's testimony on the basis of improper command influence after he testified in rebuttal (Tr. 2428). The trial judge denied the motion (Tr. 2435).

(C.M.A. 1977). Congress modified the insanity defense for the civilian federal courts in the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, § 402(a), 98 Stat. 2057 (18 U.S.C. 20), renumbered by the Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 34(a), 100 Stat. 3599 (codified at 18 U.S.C. (Supp. IV) 17). Among other things, the 1984 amendments made insanity an affirmative defense and eliminated an insanity defense based on a defendant's inability to conform his conduct to the requirements of the law. In 1986, the UCMJ was amended to reflect those changes. Military Justice Amendments of 1986, Pub. L. No. 99-661, § 802(a)(1), 100 Stat. 3905. At present, the defendant bears the burden of proving by clear and convincing evidence that, as a result of a severe mental disease or defect, he was unable to "appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense." 10 U.S.C. (Supp. IV) 850a(a). Although the 1986 amendments apply prospectively (Pet. App. 5a), it is noteworthy that the only part of the insanity standard on which petitioner's experts were in complete agreement is no longer the law.

3. Petitioner also renews his contention that the court-martial panel was erroneously instructed in several respects.

a. The trial judge instructed the panel on the elements of the offense of murder committed by means of an inherently dangerous act, as follows (Tr. 2710; Pet. App. 3a (emphasis added)):

> For an act to be inherently dangerous to others and demonstrate a wanton disregard for human

> life, the act must (a) be inherently dangerous to and show a wanton disregard for the life of more than one person; (b) be such that its probable results, *if* known to the accused, would be death or great bodily harm; and (c) be intentionally done by the accused, although death or great bodily harm does not have to be the intended result; and (d) demonstrate a total disregard for the known probable results of death or great bodily harm.

Petitioner argues (Pet. 19-21) that the trial court's insertion of the word "if" into that otherwise standard instruction negated the requirement that petitioner must have known that the probable results of his acts could be fatal in order for him to be found guilty.[16] It is not clear, however, that petitioner preserved that claim. The Court of Military Appeals found that he had waived it (Pet. App. 4a), because he only belatedly expressed concern over the form of the instruction and did not specifically object to it on the precise ground that he now raises (Tr. 2841).[17]

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[16] With the exception of the word "if," the above instruction is a standard instruction. Dep't of the Army Pamphlet No. 27-9, *Military Judge's Benchbook* 3-172 (Oct. 15, 1986). Petitioner cites no other case, and we are aware of none, in which this question has ever arisen.

[17] The defense was mute when the trial judge first gave the instruction (Tr. 2710-2711). When the trial judge reinstructed the panel, the defense noted that the standard instruction did not contain the word "if" (Tr. 2828). Subsequently, the defense asked that the panel be "briefly reminded" that there was a scienter requirement that could be affected by a defense of "partial mental responsibility" (Tr. 2837, 2840-2841). The trial judge denied the request on the ground that the panel had been repeatedly charged that petitioner could not be found guilty unless he knew that the consequences of his actions could be fatal (Tr. 2842-2843).

But even if petitioner preserved that claim, it is insubstantial.[18]

It is immaterial whether the scienter requirement is framed as "known to the accused" or "if known to the accused." Under either formulation, the trier of fact would be required to find that the defendant was aware of the consequences of his acts. The last portion of the above instruction (part (d)) made that point expressly; it required the panel to find that the "probable results of death or great bodily harm" were "known" by petitioner. Petitioner's claim that he was prejudiced by this instruction is also highly dubious. In light of the fact that petitioner had been a tank commander, it is implausible to believe that he did not know that the likely consequence of firing an armor-piercing shell at close range into a tank filled with sleeping people would be the death or serious injury of everyone inside. Nothing in the record suggests that the panel should have had any doubt about petitioner's knowledge on that score, and even petitioner does not claim that he was ignorant of that likely outcome.[19]

b. The trial judge instructed the panel that petitioner was not criminally responsible for his actions if, as a result of mental disease or defect, he lacked substantial mental capacity either to appreciate the

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[18] Although the Court of Military Appeals was divided on the question whether the instruction was correct, even the dissenting judge agreed that the error did not require reversal. Pet. App. 12a.

[19] Petitioner relies (Pet. 19-20) on the fact that the panel members asked to be reinstructed on the elements of that offense. That request is unremarkable, however, in light of the length and detail of the instructions, which the president of the panel described as "very specific and complicated" (Tr. 2823).

criminality of his conduct or to conform his conduct to the requirements of law (Tr. 2745). The court went on to state that "[a] lack of substantial capacity exists when there is a substantial or great impairment of that capacity, but a complete impairment is not required" (Tr. 2746). Petitioner argues (Pet. 21-22) that the trial judge erred by using the terms "substantial or great impairment of that capacity" to define "a lack of substantial capacity." That claim, however, rests on the assumption that the panel would have relied on the same type of mathematical formula that petitioner uses to explain his argument (see Pet. 21-22) and therefore would have interpreted the trial court's charge as internally inconsistent. That scenario is highly unlikely. The panel almost certainly interpreted the trial judge's instruction as requiring the panel to decide whether petitioner had significantly less than full capacity to appreciate the wrongfulness of his acts and to conform his conduct to the requirements of the law. The instruction that was given properly directed the panel to make that determination. The distinction that petitioner draws between the trial judge's instruction and the instruction that petitioner would have preferred is largely semantic.

c. Petitioner contends (Pet. 22-24) that the trial judge erred by failing to instruct the panel that petitioner could be convicted of voluntary manslaughter as a lesser included offense of unpremeditated murder. That claim is insubstantial, for several reasons. First, petitioner did not raise that claim at trial or on appeal and has therefore waived it.[20] Second, at

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[20] Petitioner first raised that claim in a "Petition for Reconsideration Out of Time" filed with the Court of Military Appeals, which denied petitioner leave to file the petition. Pet. App. 31a. Petitioner has offered no explanation for not

trial petitioner specifically objected to instructing the panel that voluntary manslaughter and attempted voluntary manslaughter were lesser included offenses to murder and attempted murder (Tr. 2468, 2486, 2511).[21] Having opposed any instruction on voluntary manslaughter, petitioner cannot now fault the trial court for not giving an additional and unrequested instruction on that theory. Third, the panel was instructed on voluntary manslaughter as a lesser included offense of the two charges of premeditated murder (Tr. 2725-2728). The panel obviously concluded that petitioner was not guilty of voluntary manslaughter, because the panel failed to convict him of that charge as a lesser included offense of premeditated murder. There is, accordingly, no reason to believe that the panel would have convicted him of voluntary manslaughter if it had been charged as a lesser included offense of unpremeditated murder.

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raising his claim earlier, and the authorities he cites were in existence when he filed his original pleading with the Court of Military Appeals. Under these circumstances, petitioner has waived his claim. *Solorio* v. *United States*, No. 85-1581 (June 25, 1987), slip op. 15 n.18.

[21] Petitioner argued that there was no reasonably adequate provocation under the facts of the case (Tr. 2468-2470) and that if the panel believed that petitioner's deluded beliefs led him to fear for his life, "then [the panel] must buy the insanity defense" (Tr. 2470). At trial, petitioner contended that the facts did not suggest a defense of voluntary manslaughter "but an all-or-nothing proposition based on the insanity defense" (*ibid.*). In support of his motion for a finding of not guilty to Specifications 3 and 4 of Charge 1 (*i.e.*, unpremeditated murder), petitioner reiterated that "[e]ither he was insane at the time and he fired under a delusion; or he did a premeditated act to kill individuals" (Tr. 2482).

4. Petitioner's final claim (Pet. 24-25) is that the panel may have been influenced by the improper actions of one of its members, Major Oberlin. After trial, Major Oberlin produced an affidavit (Pet. App. 8a-9a) in which he stated that during the trial, he attempted to simulate the position of the two tanks involved on the night of the incident (*id.* at 8a). He did so in order to determine what part of the rear tank could be seen by looking from the forward tank with the gun in a travel lock position, so that he could gain some insight into petitioner's intent. Major Oberlin reported that the results of his simulation were "inconclusive" (*ibid.*). He also stated that the information he gained did not play any role in his decision, nor did he use it to influence the other panel members (*id.* at 8a-9a). The Court of Military Appeals found that the simulation, while improper, did not constitute reversible error. Pet. App. 10a; *id.* at 11a (opinion of Everett, C.J.).

That ruling is correct. Major Oberlin's statement that the simulation did not affect his deliberations is not inherently suspect, as petitioner suggests (Pet. 24). See *Smith* v. *Phillips*, 455 U.S. 209, 217 n.7 (1982). In addition, there is nothing to support petitioner's conjecture that Major Oberlin communicated anything about the information he gained from the simulation to the other members of the panel. Major Oberlin swore that he did not use any information "in any way to influence other panel members." Pet. App. 9a. Moreover, the central issue at petitioner's trial was his mental responsibility for the murders, and any information that Major Oberlin acquired by virtue of his simulation did not bear on that issue. In sum, the Court of Military Appeals correctly found that Major Oberlin's inconclusive simulation,

although improper, could not have had a material effect on the verdict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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